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July 30, 2010

VIA HAND DELIVERY

Jeff S. Jordan, Esq.
Supervising Attorney
Complaints, Examinations & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6317 – Timothy S. Stewart, SADDLEPAC, and Utah Defenders of Constitutional Integrity

Dear Mr. Jordan:

This office represents Timothy S. Stewart ("Mr. Stewart"), SADDLEPAC, and the Utah Defenders of Constitutional Integrity in the above-captioned MUR.

We have reviewed the Complaint filed on June 23, 2010, by Dan Hauser on behalf of Friends of Mike Lee. The Complaint alleges that the respondents illegally conspired to disseminate a direct mail piece that failed to include required disclaimers under the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") and Commission regulations. Complaint at 2.¹ The Complaint further alleges that the respondents failed to report to the Commission the cost of preparing and distributing the mail piece as an independent expenditure, that respondents were required to register with the Commission as a political committee, and that respondents accepted impermissible anonymous contributions. *Id.* at 3.

The allegations contained in the complaint are baseless. Because the mail piece at issue did not contain express advocacy as a matter of law, the mail piece was not required to include a "paid for by" disclaimer under Commission regulations. Likewise, because the mail piece did not contain express advocacy, no independent expenditure reporting obligations were triggered under the Act and Commission regulations. Moreover, because the mail piece did not contain express advocacy and

¹ The Complaint fails to include numbered pages. All citations herein to the pages of the Complaint are based upon our own page numbering.

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the respondents did not otherwise make any expenditures under FECA, there was no obligation to register any entity as a political committee pursuant to Commission regulations. In any event, given the grassroots nature of the activities at issue and the very small amount of money spent on the mail piece, the Commission should dismiss the Complaint based upon prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). For all the foregoing reasons, the Commission should promptly dismiss the Complaint.

FACTUAL BACKGROUND

I. The Utah Defenders of Constitutional Integrity

The Utah Defenders of Constitutional Integrity ("UDCI") was a grassroots collection of individuals who planned to pool limited personal resources in the spring of 2010 to produce and disseminate a mail piece in Utah concerning "Utah Values." See Utah Values Mail Piece (attached hereto as Exhibit 1). The individuals involved had no intention of creating an ongoing, formal organization or working together any longer than necessary to disseminate the Utah Values Mail Piece. In light of that, the individuals involved in the effort did not open a bank account or take any other action to establish an ongoing entity.

Shortly after the Utah Republican caucus meetings on March 22, 2010, the individuals involved with UDCI shared with one another their displeasure about an ongoing whisper campaign propagated by various U.S. Senate candidates in Utah and their supporters regarding which candidate was the staunchest defender of the U.S. Constitution and which candidate possessed the greatest "Utah values." This whisper campaign played a prominent role in the conduct and outcome of the Republican caucus meetings. To express their frustration with the whisper campaign, the individuals involved decided to create a satirical mail piece aimed at criticizing the nature of the ongoing whisper campaign and ultimately distributed the Utah Values Mail Piece.

II. Timothy S. Stewart

Mr. Stewart is a native of Utah and a political consultant who currently resides in Falls Church, Virginia. In early April 2010, several individuals in Utah contacted Mr. Stewart and requested his assistance in developing and producing the Utah Values Mail Piece. Mr. Stewart in turn contacted Michael Copperthite from Capital Campaigns, Inc. and contracted with Capital Campaigns, Inc. to create and disseminate the Utah Values Mail Piece. Mr. Stewart used his personal funds to pay Capital Campaigns, Inc. a deposit of \$3,500 on behalf of the effort with the expectation that he would be repaid. To date, Mr. Stewart has received approximately \$820 towards repayment.

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III. SADDLEPAC

SADDLEPAC is a federal, nonconnected political action committee and Mr. Stewart serves as its treasurer. SADDLEPAC had no involvement whatsoever with the Utah Values Mail Piece or with the UDCI effort.

IV. The Utah Values Mail Piece

On or about May 4, 2010, the Utah Values Mail Piece was sent to approximately 2,000 of the 3,500 delegates to the Utah Republican state convention. The Utah Values Mail Piece cost approximately \$4,700 to design, print, and mail. The Utah Values Mail Piece contained the following disclaimer: "Paid for by Utah Defenders of Constitutional Integrity. Not authorized by any candidate or candidate's committee." See Utah Values Mail Piece (Exhibit 1). The disclaimer did not include a phone number, physical street address, or a web address for UDCI.² The individuals involved with the effort intended to include a phone number on the Utah Values Mail Piece so that interested recipients could call volunteers and engage in a discussion of the issues. However, a miscommunication occurred during the design and printing process that resulted in an unintentional omission of any phone number on the Utah Values Mail Piece.

DISCUSSION

The Complaint alleges that the respondents violated the Act and Commission regulations by (1) failing to include proper disclaimers on the Utah Values Mail Piece, (2) failing to report the associated costs of the Utah Values Mail Piece to the Commission as independent expenditures, and (3) failing to register an entity with the Commission as a political committee. See Complaint at 2-3.³ As is demonstrated below, given that the Utah Values Mail Piece did not contain express advocacy, the allegations in the Complaint are baseless and the Complaint should be dismissed.

I. The Utah Values Mail Piece Did Not Contain Express Advocacy as a Matter of Law.

A. There Was No Express Advocacy Under Section 100.22(a).

Under Section 100.22(a) of the Commission's regulations, a communication contains express advocacy if the communication uses certain bright-line words or phrases:

² As UDCI was not an organized entity, it never had a physical street address or web address.

³ Because SADDLEPAC had no involvement whatsoever with the Utah Values Mail Piece or with UDCI, the Commission should promptly dismiss the Complaint against SADDLEPAC.

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Expressly advocating means any communication that—(a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Rush” or “Mondale!”

11 C.F.R. § 100.22(a) (emphasis in original). This section of the Commission’s regulations is drawn directly from the Supreme Court’s ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), and is commonly referred to as the “magic words test.”

The Utah Values Mail Piece did not satisfy the strict “magic words” test of Section 100.22(a). The communication did not include any of the specific terms or phrases identified in Section 100.22(a) or in the Supreme Court’s *Buckley v. Valeo* ruling, nor did the communication contain any campaign slogan or individual words “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates.” 11 C.F.R. § 100.22(a).

B. Given that Multiple Federal Courts Have Struck Down Section 100.22(b) as Unconstitutional, It Should Not Be Applied Against Respondents.

Section 100.22(b) of Commission regulations states that expressly advocating includes any communication that:

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

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Chairman Petersen and Commissioners Hunter and McGahn recently noted that Section 100.22(b) has had a "checkered history" and that "portions of section 100.22—namely, subsection (b)—have been held unconstitutional by every federal court that has considered the regulation on its merits." Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MURs 5694 and 5910 (Americans for Job Security, Inc.) at 2, 7 fn. 26 (Apr. 27, 2009) ("SOR by Petersen, Hunter, and McGahn in AJS MUR"). See e.g., *Maine Right to Life Comm., Inc. v. Fed. Election Comm'n*, 914 F. Supp. 8 (D. Me.), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997) ("MRLC"); *Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) ("CAN II"); *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 392 (4th Cir. 2001) (noting that in the wake of MRLC and CAN II the Commission voted unanimously not to enforce Section 100.22(b) in the First and Fourth Circuits); *Right to Life of Dutchess Co., Inc. v. Fed. Election Comm'n*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998) ("11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley v. Valeo*"). Given that multiple federal courts have struck down Section 100.22(b) as unconstitutional, and given that the Commission itself has prudently chosen not to enforce Section 100.22(b) in the First and Fourth Circuits, the Commission should exercise the same prudence in this matter and not enforce Section 100.22(b) against the respondents.

Even assuming that Section 100.22(b) is constitutional, the Utah Values Mail Piece did not contain express advocacy under the regulation. The Commission emphasized when it promulgated Section 100.22(b) that in order for the provision to be triggered, "the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action." 60 Fed. Reg. 35292, 35295 (Jul. 6, 1995). The Commission also made clear that "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* In their Statement of Reasons in the AJS MUR, Chairman Petersen and Commissioners Hunter and McGahn emphasized that "[t]he plain language of section 100.22(b) limits its reach to speech that 'could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because the 'electoral portion' is 'unmistakable, unambiguous, and suggestive of only one meaning.'" SOR by Petersen, Hunter, and McGahn in AJS MUR at 8 (quoting 11 C.F.R. § 100.22(b)). The Commissioners also noted that:

[T]he standard for 'express advocacy' is not whether a communication might somehow be seen as campaign-related, or whether such a reading is a reasonable, or perhaps even the most reasonable, interpretation. Instead, as long as 'reasonable minds' can plausibly interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad does not contain 'express advocacy' as defined by section 100.22(b). This is so even in cases where a

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communication 'discusses or comments on a candidate's character, qualifications, or accomplishments.'

Id. (citations omitted). "Thus, section 100.22(b), even though somewhat broader than section 100.22(a), still sets a very high bar." *Id.* (emphasis added).

The Utah Values Mail Piece did not contain an "unmistakable" and "unambiguous" message urging recipients to vote a specific way. Rather, the satirical communication called attention to and criticized an ongoing whisper campaign regarding which candidate allegedly possessed the most "Utah values" by using terminology specific to the Church of Jesus Christ of Latter-Day Saints. The Utah Values Mail Piece did not expressly advocate for or against the election of any clearly identified federal candidate; rather, it subtly advocated against invoking religious values as a political litmus test in Utah and sought to provoke a thoughtful response and dialogue among those who had taken the position that any one candidate was more righteous than another. Accordingly, a reasonable person could interpret the Utah Values Mail Piece as containing something other than an appeal to vote for or against a clearly identified federal candidate and thus Section 100.22(b) of the Commission's regulations is not satisfied.⁴

II. Given That The Utah Values Mail Piece Did Not Contain Express Advocacy, The Communication Was Not Required to Have a Disclaimer.

Commission regulations provide that "[a]ll public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate" must include a disclaimer. 11 C.F.R. § 110.11(a)(2).⁵ Other types of communications that must include disclaimers include all public communications made by a political committee, all public communications that solicit contributions made by any person, and all electioneering communications made by any person. See 11 C.F.R. § 110.11(a)(1), (3-4).

⁴ This conclusion is further supported by the fact that:

the Commission has already determined that outside independent groups are permitted to discuss in their communications the public policy positions of government officials and public figures, indicate a preference for one candidate over another in the context of contrast communications, refer to individuals as candidates, identify the election year, and even urge the public to become better informed about the candidates without satisfying the definition of express advocacy found at section 100.22(b)."

SOR by Peterson, Hunter, and McGahn in AJS letter at 13 (emphasis added).

⁵ Commission regulations define a public communication as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. § 100.26. A mass mailing is further defined as "a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 11 C.F.R. § 100.27.

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Given that the Utah Values Mail Piece did not contain express advocacy, no disclaimer was required to be included in the communication pursuant to 11 C.F.R. § 110.11(a)(2). Moreover, because the communication was not disseminated by a political committee, did not contain a solicitation for funds, and did not constitute an electioneering communication, no disclaimer was required on the communication under 11 C.F.R. § 110.11(a)(1), (3-4). Accordingly, the Commission should find no reason to believe that a disclaimer violation occurred in connection with the Utah Values Mail Piece.

III. Independent Expenditure Reporting Obligations Were Not Triggered.

Commission regulations define an independent expenditure as an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 C.F.R. § 100.16(a). Independent expenditures must be reported to the Commission through regularly scheduled disclosure reports and, in some circumstances, through 24- and 48-hour notices. *See generally* 11 C.F.R. § 104.4. However, communications that do not contain express advocacy are not independent expenditures and are not required to be reported to the Commission as such. Given that the Utah Values Mail Piece did not contain express advocacy, the Commission should find no reason to believe that any independent expenditure reporting requirements were triggered.

IV. UDCI Was Not Required to Register With the Commission as a Political Committee.

A "political committee" is defined in the Act as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(7)(A). *See also* 11 C.F.R. § 100.5(a) (tracking statutory language). The Supreme Court, addressing vagueness concerns, has narrowed "expenditures" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 88 (1976).

Similarly, the Supreme Court has narrowly construed the definition of "contributions" "to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but earmarked for political purposes." Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5541 (*The November Fund et. al.*) at 4-5 (Jan. 22, 2009) (internal quotations omitted) (citing *Buckley*, 424 U.S. at 24 n. 24, 78) ("SOR by Petersen, Hunter, and McGahn in November Fund MUR").

Finally, even if the statutory contribution/expenditure threshold is triggered, the Supreme Court has further narrowed the term "political committee" to "only encompass organizations that are under

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the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79-80. "Thus, the definition of 'political committee' is narrow." SOR by Petersen, Hunter, and McGahn in November Fund MJR at 5.

As was outlined above, the Utah Values Mail Piece did not contain express advocacy as a matter of law; accordingly, none of the costs associated with producing and distributing the communication constituted "expenditures" for purposes of political committee status under the Act. In addition, as is discussed above, the UDCI was a joint effort by several individuals at the grassroots level and there was no organizational structure whatsoever. The fact that UDCI never existed as an organization precludes a finding that any organization's major purpose was "the nomination or election of a candidate." *Buckley*, 424 U.S. at 79-80. In light of the foregoing, the Commission should find no reason to believe that the respondents violated the Act by failing to register as a political committee.⁶

V. In Any Event, Given The Very Low Dollar Amount Involved, The Commission Should Dismiss the Complaint Based Upon Prosecutorial Discretion.

As was outlined above, the Utah Values Mail Piece was developed and paid for primarily by several individuals, was distributed at the grassroots level, and less than \$5,000 was spent in total on the activity in question. In light of the foregoing, the Commission should exercise its prosecutorial discretion under *Hickler v. Cheney*, 470 U.S. 821 (1985), and dismiss the Complaint.

⁶ The Commission should likewise reject the allegation that the respondents accepted impermissible anonymous contributions. See Complaint at 3. 11 C.F.R. § 110.4(c)(3) provides that any "candidate or committee receiving an anonymous contribution in excess of \$50 shall promptly dispose of the amount over \$50" (emphasis added). Given that the grassroots activities of the individuals involved with the Utah Values Mail Piece did not trigger political committee status, there is no reason to believe that respondents accepted impermissible anonymous contributions.

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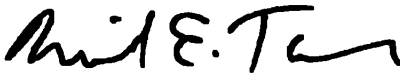
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CONCLUSION

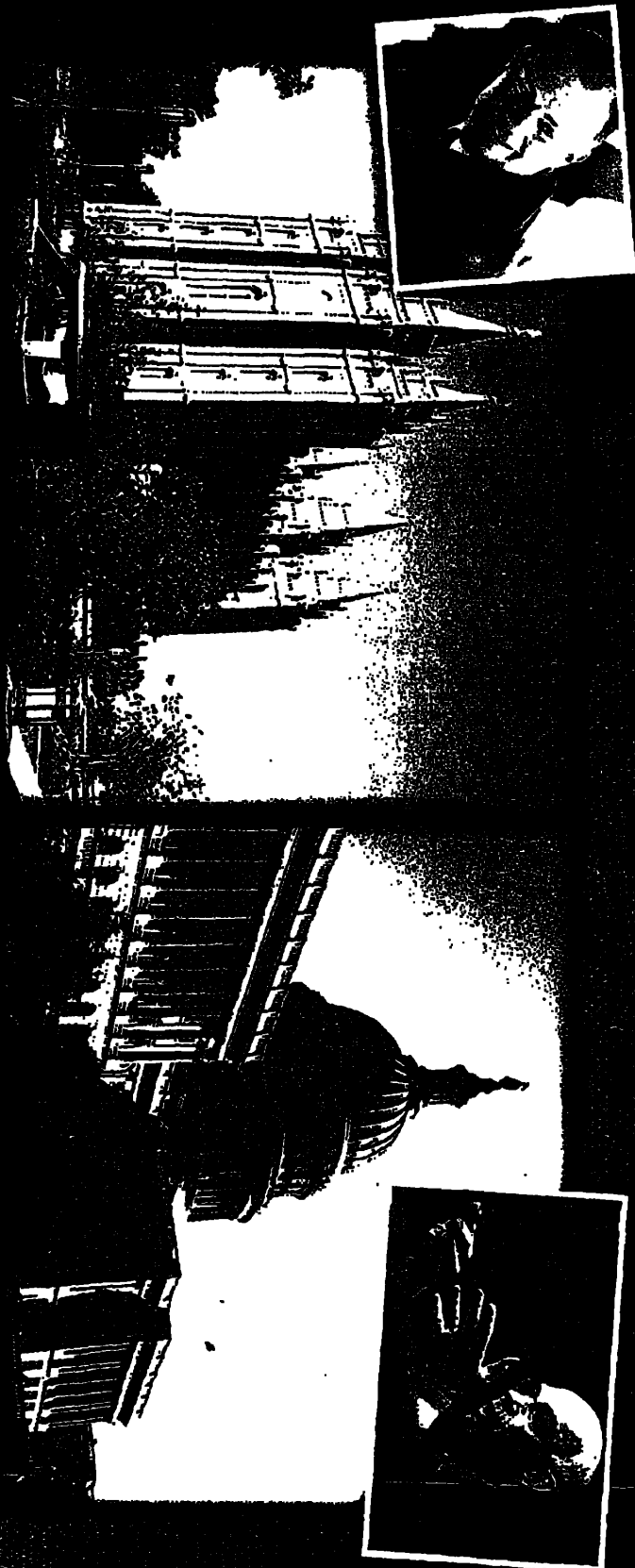
For all the foregoing reasons, there is no reason to believe a violation occurred with respect to the allegations contained in the Complaint. In any event, given the very low amount of money spent in connection with the activities at issue, the Complaint should be dismissed based upon prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

Respectfully submitted,



Michael E. Toner
Brandis L. Zehr

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Which candidate really has Utah values?

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Utahans Value the Constitution Above All Else.

But we know it hangs by a thread.

Does Senator Bennett care? Or does he care about staying in power?

Can he help save it - if he doesn't even know it?

You know the answer and you have the power to change things.

Utahans value the Constitution. Please encourage voters to make the right choice.

Utahans Value the Constitution.

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